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IDAHO PERSONNEL COMMISSION
STATE OF IDAHO

SUSAN ISAAC,

Petitioner,

vs.

DEPT OF CORRECTION,

Respondent.

IPC NO. 98-05

**DECISION AND ORDER
ON PETITION FOR
REVIEW**

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on February 12, 1999. Petitioner Susan Isaac (Isaac or Petitioner) was represented by F. Michael Burkett, Jr.; Respondent Department of Correction (Department) was represented by Paul R. Panther, Deputy Attorney General. The petition for review involved the hearing officer's decision dated September 4, 1998. WE AFFIRM.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts.

Petitioner Susan Isaac is a classified employee of the Department. In October, 1997 at the time the issues leading to this appeal arose, Isaac was a food service officer at a Department facility. At that time she was the second most senior of the eight employees in the food service division. It appears that in the food service division, shift assignments are based on a seniority bidding system. On October 17, 1997, Isaac was assigned to the graveyard shift. As a less preferable shift, the graveyard shift was usually left to the employees with the least seniority.

1. *December 5 Problem Solving Request*

On December 5, 1997, Isaac filed a request for problem solving, seeking resolution of a number of issues. Issues relevant to this appeal were limited to the shift change, the denial of her seniority, and an investigation which Isaac alleged had been conducted without notice. Included with Isaac's problem solving request was a list of individuals that Isaac believed had information pertinent to the resolution of her concerns, and requests for physical and documentary evidence pertaining to the alleged investigation.

On December 15, 1997, the problem solving meeting was held. The record is unclear as to who was present. Individuals that Isaac had asked to be present were not allowed to attend, nor was the physical and documentary evidence she requested provided.

Warden Paskett issued his response to the problem solving meeting on December 17. In pertinent part, his response noted that:

1. Isaac's shift change was made for reasons of institutional need;
2. The seniority bidding policy upon which Isaac relied did not apply to food service staff, only to security staff, but even if it were applicable, the policy allows seniority to be suspended based on institutional need;

3. So far as Paskett was aware, Isaac had not been investigated by the Department regarding allegations that she brought contraband into the institution, had never been investigated by Deputy Warden Miller, and apart from knowledge of a letter from a law firm which had been mistakenly delivered to Deputy Warden Miller, was unaware of an investigation regarding a workers compensation claim; and,

4. Deputy Warden Miller did not make statements that Jacobs was involved in an improper sexual relationship with another employee.

Isaac disagreed with Warden Paskett's decision regarding her problem solving request, and on January 5, 1998, filed an "Objection and Request for Review by the Director." Director Spalding responded to Isaac's requested review by memo dated January 21, 1998.

Director Spalding supported the restructuring of the food service division which resulted in the rearranging of shifts. The director noted that while such shift changes could negatively affect individual employees, institutional needs must remain the primary focus of decision-making. The director also pointed out that it is a job requirement of the food service officer position to be willing to work various shifts and various days. Director Spalding also noted that the seniority policy for shift bidding was only applicable by its terms to security staff.

Director Spalding also reaffirmed Warden Paskett's determination that there was no evidence that Isaac had been under formal investigation for work-related matters. Director Spalding noted that the lack of a formal investigation should not be read to preclude the possibility of Isaac's name surfacing in a fact-finding such as occurred as a result of an inmate gaining access to a knife blade from the kitchen area.

This decision by Director Spalding concluded the Petitioner's December 5, 1997 problem solving request.

2. December 30 Problem Solving Request

On December 16, 1997, Petitioner Isaac received a letter of reprimand. The reprimand arose from the discovery in September, 1997, that three knife blades were missing from the kitchen inventory. The subsequent review revealed that Isaac and another employee, food service officer Terry Jacobs, had known since March, 1997, that an inmate had hidden a security key which accessed the knife box. This information was not reported by Isaac and Jacobs until October 1997. The letter of reprimand noted that Petitioner's failure to report or remediate inmate access to knife blades constituted a violation of Department policy and IPC rules. The letter of reprimand concluded by reminding Petitioner that she could request problem solving regarding the reprimand by filing a request within five working days.

On December 30, 1997, Isaac filed a second request for problem solving. This request identified several issues for problem solving, but the only one relevant to this appeal pertained to the December 16 letter of reprimand. Petitioner asked that the reprimand be rescinded.

The Department misfiled the December 30 request with the December 5 problem solving request. By memo dated January 20, 1998, Phyllis Blunck, Personnel Manager, notified Isaac of the subsequent reappearance of the December 30 filing. Because the Director's response to Isaac's first problem solving request addressed all the issues raised in her second request, including the letter of reprimand, Ms. Blunck advised Isaac that the December 30 request would not be pursued further by the Department.

B. Appeal to Personnel Commission.

Isaac filed two timely appeals with the IPC on February 25, 1998. The first appeal was from Director Spalding's January 21, 1998 final decision regarding her December 5 problem solving request. The appeal alleged that Director Spalding's final decision was arbitrary and without basis in law or fact, deprived Isaac of a right or benefit to which she was entitled by law, and was a violation of Idaho Code § 67-5315 and Department policies. The second appeal was regarding the Department's response to her December 30, 1997 problem solving request. The appeal alleged that the denial of Isaac's December 30 problem solving request was arbitrary and without basis in fact or law, deprived Isaac of a right or benefit to which she was entitled by law, subjected Isaac to discipline without due process, and was a violation of Idaho Code § 67-5315 and Department policies. Both appeals were consolidated as IPC No. 98-05 and assigned to hearing officer Bergquist.

The Department filed a motion to dismiss on July 17, 1998. The motion was briefed by both parties. The hearing officer issued his Order Granting Motion to Dismiss on September 4, 1998.

Isaac filed a timely petition for review.

II.

ISSUE

There is really only one issue to be decided in this matter: Did the hearing officer err in dismissing Isaac's appeal for lack of jurisdiction? The primary issue raises several subsidiary issues:

1. Was Petitioner's December 5, 1997 problem solving request handled in accordance with applicable statutes, rules, and policies?
2. Did the Department deny Petitioner access to the problem solving process?

3. Is problem solving as established by Idaho Code § 67-5315 a “right and/or benefit” to which Petitioner is “entitled by law?”

III.

STANDARD AND SCOPE OF REVIEW

The standard and scope of review on disciplinary appeals to the IPC is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd* Case No. CV 96-00106 (Dist. Ct. 2nd Dec. 6, 1996) (footnote omitted). This case presents only issues of law over which we exercise free review.

IV.

ANALYSIS

A. Preliminary Matters.

Along with its briefing on the petition for review, the Department filed a motion seeking to supplement the excerpt of record provided by Petitioner. The documents

included in the request to supplement were, with one exception, included in the record created before the hearing officer and are thus before the Commission. There is a long line of authority which holds that the Commission is precluded from taking further evidence on petition for review. *Fridenstine v. Idaho Dep't of Admin.*, IPC No. 95-12 (Aug. 23, 1996), citing IDAPA 28.01.01.202; *Leone v. Idaho Dep't of Correction*, IPC No. 95-06 (June 25, 1996), citing *Sarbacher v. Lewis-Clark State College*, IPC No. 95-03 (Sept. 15, 1995); *Bowen v. Idaho Dep't of Fish and Game*, IPC No. 94-21, p. 3, n. 2, (Decision and Order on Remand, Feb. 27, 1996), citing *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (Dec. 15, 1995), *Department of Health and Welfare v. Sandoval*, 113 Idaho 186, 188 n. 2, 742 P.2d 992, 994 n. 2 (Ct. App. 1987), I.C. §§ 67-5316, 67-5317.

For the reasons stated above, the Commission denies the Department's request to supplement the record.

B. December 5 Problem Solving Request.

The hearing officer correctly determined that the Commission lacked jurisdiction to hear an appeal of Isaac's December 5 problem solving request.

It is well settled law that:

As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them . . .

Washington Water Power Co., v. Kootenai Environmental Alliance, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979) cited in *Sheets v. Idaho Department of Health and Welfare*, 114 Idaho 111, 113, 753 P.2d 1257, 1259 (1988). Appeals to the Commission are limited by statute. Pertinent to this appeal, Idaho Code § 67-5316(1)(b) provides that an

employee may appeal the failure of an appointing authority to grant a right or benefit to which the employee is entitled by law.

The statutory scheme creating the problem solving and due process procedures recognized that not every issue which was appropriate for problem solving would be appealable. Because very few problem solving procedures will involve a right or benefit to which an employee is entitled by law, very few problem solving outcomes will be appealable.

Isaac claims that she is entitled to appeal because she was denied a right or benefit when she was not allowed to present witnesses or introduce physical or documentary evidence at her problem solving meeting. The hearing officer rightly noted that nothing in Idaho Code § 67-5315, IPC Rule 200, or Department policy *entitles* an employee to present witnesses or introduce evidence during a problem solving. The Department's problem solving policy (Department of Correction Policy 203(4)(c)(2)) suggests that the decision maker "should take into account" the preference of the employee in deciding who shall be present at the meeting. This permissive language is in contrast with the mandatory language found in Idaho Code § 67-5315, IPC Rule 200.04, and Department policy which entitles an employee to representation by a person of their choice at the later stages of the problem solving process.

Problem solving is not and was not intended to be a quasi-judicial *bearing*. It is a simple process designed to encourage dispute resolutions by more informal means.

The procedure shall contain a statement from the department head encouraging employees to use the procedure for any nondisciplinary, job-related matters, and encouraging the employee, supervisors, and upper-level managers and administrators to resolve the matter at the lowest management level possible within the organization.

IPC Rule 200.04. Isaac's problem solving request led to a problem solving meeting, was given full consideration by Warden Paskett, and was reviewed and considered by Director Spalding who issued a final decision, all in accordance with applicable statutes, rules and policies. Petitioner agrees that the matters which were the subject of the problem solving, in and of themselves, do not fall within the rights and benefits language. Isaac received the full benefit of the problem solving process, but not the outcome which she sought. Petitioner was denied no right or benefit to which she was entitled.

Further, this Commission lacks jurisdiction over Isaac's appeal of the December 5 problem solving outcome because Isaac's request for problem solving was not timely. IPC Rule 200.04 requires the initial problem solving request be filed within "five (5) working days after being notified or becoming aware of a nondisciplinary matter which may be handled through the problem-solving procedure." In this case, Petitioner learned of the shift change on October 17, 1997. Her request for problem solving was not filed until December 5, 1997. Not including holidays and weekends, 34 business days elapsed from notice of the shift change to the problem solving request. An untimely request *may* be accepted and considered by the Department, but "the employee waives any right of review by the Commission by not complying with the time limit for filing." IPC Rule 200.03. Even if the December 5 problem-solving process was fatally flawed, Petitioner waived any right to appeal when she waited thirty-four days to file her problem solving request.

C. December 30 Problem Solving Request.

Petitioner's December 30 problem solving request was a result of the letter of reprimand which she received on December 16, 1997. A letter of reprimand is an appropriate subject for problem solving. It is not-disciplinary in nature and not otherwise precluded by Idaho Code § 67-5315. Petitioner contends that the Department declined to

consider her request for problem solving, and that such a refusal constituted the denial of a right or benefit to which she was entitled by law. This raises two questions: Did the Department fail to provide Petitioner access to the problem solving process; and if so, is problem solving as established by Idaho Code § 67-5315 a “right and/or benefit” to which Petitioner is “entitled by law?”

Did the Department deprive Isaac of access to the problem solving process when it chose not to consider her December 30 request? A careful review of the two problem solving requests and Director Spalding’s response shows that Isaac was not denied access to the process.

The issues raised in the first problem solving request were:

1. The shift change, which included:
 - a. the issue of seniority bidding;
 - b. a claim that the shift change is tantamount to constructive discharge;
2. Alleged investigations, which included:
 - a. alleged investigation that Isaac brought contraband into the institution with intent to sell;
 - b. alleged investigation into Isaac’s relationship with a co-worker;
 - c. alleged investigations regarding workers compensation claims;
3. That Deputy Warden Miller’s actions caused rumors about Isaac’s relationship with a co-worker and resulted in a hostile work environment;
4. That Deputy Warden Miller was retaliating against Isaac for previously exposing a workplace impropriety; and
5. That she was denied the opportunity to present witnesses and evidence.

The issues raised in the December 30 problem solving request were:

1. The December 16, 1997 letter of reprimand;
2. The alleged investigation into inmate access to knife blades.

The letter of reprimand was issued, and Isaac's second problem solving request was filed, prior to Director Spalding's final decision on the December 5 problem solving request. It is clear from Spalding's letter that he considered all of the documents concerning both requests before making a final decision on her first request. The director's final decision in the December 5 request addressed the following issues:

1. Denial of her request to present witnesses and evidence (Dec. 5, Issue 5).
2. The shift change (Dec. 5, Issue 1), including:
 - a. seniority bidding (Dec. 5, Issue 1.a);
 - b. recognition of the hardship that a shift change could cause, and observation that shifts would rotate ever six months and that employee preferences would be considered, and that shift trading might be possible (Dec. 5, Issue 1.b);
3. Alleged investigations (Dec. 5, Issue 2; Dec. 30, Issue 2), including:
 - a. alleged investigation concerning contraband (Dec. 5, Issue 2.a);
 - b. alleged investigation concerning rumors of a relationship with a co-worker (Dec. 5, Issue 2.b, and Issue 3);
 - c. alleged investigation concerning workers compensation (Dec. 5, Issue 2.c);
 - d. alleged investigation concerning inmate access to knife blades (Dec. 30, Issue 2);
4. Allegations of retaliation (Dec. 5, Issue 4);
5. Letter of reprimand (Dec. 30, Issue 1).

This list encompasses every issue that Petitioner raised in her two problem solving requests. When the Department discovered that it has misfiled the second request, it was clear that all those issues had been addressed along with the issues presented in the first request. To problem-solve the December 30 request in light of Director Spalding's comprehensive response would have been redundant.

In this case, and under these circumstances, Petitioner was not denied access to the problem solving process. Because Isaac was not denied access to the process, we need not determine whether the process itself is a right or benefit to which the employee is entitled by law.

V.

CONCLUSION

The hearing officer correctly determined that, with regard to the December 5 problem solving, Petitioner had not been deprived of any right or benefit which would make the problem solving result appealable. We AFFIRM the hearing officer's decision for the reasons stated therein and upon the additional ground that Petitioner waived any right to appeal by failing to file the initial problem solving request within five days of receiving notice of the shift change.

We AFFIRM the hearing officer's dismissal of the appeal pertaining to Isaac's second problem solving request, but for different reasons than those articulated by the hearing officer. The hearing officer dismissed because letters of reprimand are not disciplinary. In her Petition for Review, Isaac argued that problem solving itself was a right or benefit to which she was entitled by law and that she was entirely denied access to the process. Dismissal remains appropriate because the record is clear that Petitioner was not denied access to the process.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this 10th day of March, 1999.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/
Sherry Dyer, Chair

/s/
Peter Boyd

_____/s/
Ken Wieneke

_____/s/
Don Miller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Decision and Order in *Isaac v. Dep't of Corrections*, IPC No. 98-05, was delivered to the following parties by the method stated below on the 10th day of March, 1999.

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_____/s/_____
Val E. Rodriguez
Secretary to Executive Secretary

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